being carried out at Owens Lake appear to be the best and most obvious model for appropriate measures to control dust emissions from the Sea's lakebed.

The costs associated with an effective dust control system on a playa are substantial. The initial costs of a pilot system at Owens lake for an area smaller area that the potentially affected area of the Salton Sea's lakebed is in the vicinity of $60 million. The Draft EIR/EIS fails to consider the large potential costs involved in developing and implementing an effective system for the management and control of potential dust emissions, or who will bear those costs. This gap in the analysis prevents either the Agencies or the public from making a fully informed comparative judgment between those alternatives that reduce inflows to the Sea and hasten the exposure of its lakebed and those that incorporate fallowing and avoid hastening any decline in the Sea's elevation or exposure of its lakebed.

Given their obvious significance, it is inexcusable for the Draft EIR/EIS not to consider mitigation measures to minimize fugitive dust emissions from the exposed lakebed. The Draft EIR/EIS's assertion that dust emissions are an unavoidable impact is plainly contradicted by the ongoing successful mitigation efforts at Owens Lake.

Perhaps even more disturbing is the Draft EIR/EIS's complete failure to recognize, let alone evaluate, the real possibility that dust emissions from the exposed lakebed could contain even more toxic materials than PM10, such as pesticides and uranium.

The Draft EIR/EIS's failure to adequately address the Proposed Project's direct and indirect air quality impacts makes it impossible to make an informed judgment about the sufficiency of the proposed mitigation measures. Therefore, the Draft EIR/EIS does not comply with CEQA's requirements (see CEQA Guidelines §§ 15126, 15126.2(a), 15126.4), and a supplemental Draft EIR/EIS must be prepared and circulated for public comment.

Until these concerns are adequately addressed, the Agencies cannot make a reasoned, informed choice between alternatives based on their respective potential to cause significant adverse impacts to air quality and the potential future costs associated with the mitigation of those problems.

G26-14

Biological Resources:

G26-15

As a result of its use of a projection of changing conditions as a baseline, the Draft EIR/EIS and HCP fail to acknowledge, evaluate, or consider adequate mitigation measures for a host of significant impacts to biological resources. Among fish, the Draft EIR/EIS fails to adequately address, or provide mitigation for, the Proposed Project's significant impacts on the endangered Desert Pupfish and Razorback Sucker or on tilapia, which are the primary food source for piscivorous fish that depend on the Salton Sea.

In addition to the elimination of their food source, the Proposed Project will have a variety of significant impacts on other migratory and resident bird species, including

Response to Comment G26-15

For questions regarding the appropriateness of the Baseline, please refer to the Master Response on *Hydrology—Development of the Baseline* in Section 3 of this Final EIR/EIS. Potential impacts to desert pupfish from reduced drain flows (Impact BR-24) and water quality changes (Impact BR-26) and to razorback sucker (Impact BR-25) are described in Section 3.2 of the draft EIR/EIS and in the HCP. Specific measures for these species are included in the mitigation measures for the proposed HCP and will reduce the potential impacts to less than significant (see Impact BR-38 and BR-40). Potential impacts to tilapia are described in detail under Impact BR-45.

Potential impacts to migratory and resident bird species due to declining populations of fish in the Sea are addressed in Impact BR-46, specifically referring to pelicans, skimmers, cormorants, and other piscivorous bird species. Potential impacts to bird species due to habitat loss or change as a result of HCP implementation are described in several places in the Draft EIR/EIS (see Impacts BR-29, BR-26, and BR-48). These impacts are mitigated to less than significant by implementation of the Salton Sea Conservation Strategy and other measures included in the HCP.

Since the development of the approaches described in the HCP and Draft EIR/EIS, additional discussions with USFWS and CDFG have led to modifications, which now provide greater detail and clarity on the approach to mitigating Salton Sea impacts. See the Master Response on *Biology—Approach to Salton Sea Habitat Conservation Strategy* in Section 3 of this Final EIR/EIS.

The HCP (Attachment A to this Final EIR/EIS) includes detailed evaluations of the impact of implementing the Proposed Project and the effects of implementing the HCP on each of the covered species.

With respect to changes in the invertebrate community, please refer to the response to Comment R5-69.

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destruction of habitat due to change in the Salton Sea's elevation. Among birds, the Draft EIR/EIS fails to adequately address, or provide mitigation for, the Proposed Project's significant impacts on many species, including the California brown pelican, American white pelican, black skimmer, black rail, clapper rail, double-crested cormorant, mountain plover, snowy plover, and burrowing owl.

Among the significant impacts to birds that are in adequately addressed in the Draft EIR/EIS is the impact of a collapse in the Salton Sea's invertebrate community that would result from reduced inflows and increased salinity. The example of Mono Lake, which has already experienced such a collapse of invertebrate life to just a few species, is illustrative. Unlike the Salton Sea, which attracts large numbers of many bird species, Mono Lake attracts only a few bird species and not as large numbers as the Salton Sea. Thus, the Draft EIR/EIS's conclusion that the collapse of the Sea's invertebrate community will have a less than significant impact on the Sea's is completely unsupported.

G26-15

Sonny Bono National Wildlife Refuge:

The Draft EIR/EIS proposes that Reclamation permit a project that will deprive the Sonny Bono National Wildlife Refuge of water and illegally bring about the demise of the Refuge. This plainly constitutes a significant environmental effect that is neither acknowledged nor evaluated in the Draft EIR/EIS. The elimination of a national wildlife refuge represents the sort of severe environmental harm that CEQA requires to be avoided when there are feasible alternatives or mitigation measures. Here, there is an alternative and feasible mitigation measures that would avoid killing the Sonny Bono NWR – fallowing. But the Draft EIR/EIS and HCP neglect to even identify let alone consider the threat to this Refuge or how such harmful effects might be avoided. As a consequence of that failure, the Draft EIR/EIS and HCP cannot lawfully be certified and the proposed project cannot lawfully be permitted under CEQA.

G26-16

Pacific Flyway:

The Draft EIR/EIS and HCP fail to adequately identify, evaluate, and provide mitigation for the biological impacts of the proposed project on the Salton Sea as vital habitat for numerous migratory bird species that use the Pacific Flyway.

G26-17

Most fundamentally, the Draft EIR/EIS's analysis of potential effects on migratory birds is predicated on use of an inappropriately narrow scope that fails to properly evaluate the proposed project's impacts on migratory birds that [utilize/depend on] the Pacific Flyway. Indeed, the Draft EIR/EIS fails to include any [meaningful/substantive] analysis of cumulative effects on the Pacific Flyway.

The cumulative effects analysis of the Draft EIR/EIS is deficient under NEPA and CEQA because it ignores other threats to the Pacific Flyway.

For many of the bird species found at the Salton Sea there is effectively no place else to go. This is due in large part to the fact that almost all of California's wetlands have been

Response to Comment G26-16

The USFWS purchases water from IID to supply the Sonny Bono Salton Sea National Wildlife Refuge. The USFWS would continue to be able to purchase water to meet the needs of the refuge under the Proposed Project. The conservation program to be implemented under the Proposed Project is voluntary and therefore would not result in mandatory reductions in deliveries to the refuge.

Response to Comment G26-17

In the absence of the Proposed Project, the salinity of the Salton Sea is projected to continue to increase with consequent changes in the ecological dynamics of the sea. Water conservation and transfer under the Proposed Project would accelerate the occurrence of these changes but would not result in different effects than would ultimately occur in the absence of the Proposed Project. Implementation of the Habitat Conservation Plan component (Attachment A to this Final EIR/EIS) of the Proposed Project would avoid or mitigate the effects to biological resources of the Salton Sea that are attributable to water conservation and transfer.

In addition, under the HCP component of the Proposed Project, habitat would be created or acquired that would be equal in quality and quantity or of better quality and/or greater quantity than the habitat that could be adversely affected. Under the HCP, impacts to tamarisk scrub will be mitigated through creation or acquisition of native tree habitat consisting of mesquite bosque or cottonwood-willow habitat. Impacts to drain vegetation will be mitigated through the creation of managed marsh consisting of native cattail/bulrush vegetation. Maintenance or enhancement of habitat and forage base under the Proposed Project will result in less than significant impacts or a net benefit to many migratory species that utilize the Salton Sea and surrounding area relative to the No Action Alternative. Because the Proposed Project will not result in significant adverse impacts within the Project area, it will not contribute to adverse cumulative effects on species using the Pacific Flyway.

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destroyed by various forms of development. By way of example, the vast majority of the western United States' population of American White Pelican depends on the Salton Sea [for wintering and foraging habitat]. Because of the loss of alternative wetlands habitat, these american White Pelicans have no other suitable habitat to turn to if the Salton Sea is allowed to die. By failing to address the other historic and likely effects on alternative wetlands habitat, the Draft EIR/EIS fails to take a genuine hard look at the cumulative effects of the proposed project and other actions on migratory bird species that depend on the Salton Sea and the Pacific Flyway.

G26-17

Burrowing Owl:

The adaptive management provisions of the HCP are particularly vague regarding the burrowing owl and the owl contingency fund. The guidelines are very vague about what the Agencies actually will do to preserve the burrowing owl population, mitigate harmful effects to the owl, as well as burrowing owl habitat. The HCP's conservation measures for the burrowing owl are so vague and unenforceable as to be illusory.

The HCP fails to address how lining the canals is likely to impact the owl. The HCP does not include any information with meaningful specificity concerning where burrowing owls actually are found within the Imperial Valley and, thus, where the canal linings will impact the owl.

G26-18

The Draft EIR/EIS and HCP does not address the extent to which herbicides will be sprayed directly where the burrowing owls live. Nor does the Draft EIR/EIS and HCP address toxicity impacts on the owl from ingesting any or all of the herbicides thenselves, the water with greater concentrations of herbicide and other pollutants due to the Proposed Project, or prey that have elevated levels of these pollutants.

The proposed project's potential impacts to the burrowing owl are especially significant because approximately half of California's burrowing owl population lives in the area(s) affected by this Proposed Project.

Desert Pupfish:

G26-19

The Draft EIR/EIS and HCP fail to adequately identify, evaluate, and provide mitigation for the biological impacts of the proposed project on the Desert Pupfish. The Draft EIR/EIS and HCP claim that the Proposed Project will increase habitability for the Desert Pupfish because the Pupfish can tolerate high levels of salinity, but this neglects to consider the increased concentrations of pesticides that the Proposed Project also would cause. In addition, the assertion that the Project would increase habitability for the Pupfish ignores the fact that by the Draft EIR/EIS's own reckoning the Proposed Project would also hasten the increase in salinity to levels that are beyond even the Pupfish's tolerances.

Some streams within the affected area, such as Salt Creek, are designated as critical habitat for the pupfish. Yet there is no analysis of the Proposed Project's potential impacts on those critical habitat areas and no discussion of mitigation measures to preserve those

Response to Comment G26-18

Burrowing owls commonly inhabit burrows in the banks of IID's drains and canals. IID has been operating and maintaining its conveyance and drainage system for about 100 years. The very high concentration of burrowing owls inhabiting the Imperial Valley has developed and persisted coincidentally with IID's long-term operation and maintenance of its conveyance and drainage system. The approach to the Burrowing Owl Conservation Strategy is to reduce the potential for adverse effects to burrowing owls from IID's activities while recognizing that the available information suggests the persistence of burrowing owls in the Imperial Valley is compatible with IID's activities.

The Burrowing Owl Conservation Strategy consists of very specific measures that IID will take to minimize injury and mortality of individual owls (Owl - 2, 3, 4, 5, and 8). As explained, available data indicate that the persistence of burrowing owls in the Imperial Valley is compatible with IID's activities. The HCP includes measures to specifically test this assumption. Owl - 7 specifies that IID will conduct a demographic study to determine if the population is declining. If the population is not declining, then there is no reason to implement additional measures. However, if the population is found to be declining, the HCP Implementation Team will have access to a contingency fund to use to better understand the reasons for the decline and/or to implement specific actions to reverse the decline. It is important to note that the HCP Implementation Team will have access to this fund regardless of whether the reason for the species' decline in the Imperial Valley is attributable to IID's activities. Specific actions that the HCP IT would take with the contingency fund are not identified because it is believed the HCP IT will have a better understanding of the ecology and dynamics of burrowing owls in the Imperial Valley following completion of the demographic study, and conditions in the Imperial Valley certainly will be different in 12 to 15 year than they are today. Specification of actions to be taken at this time would not support making the best decision for protecting the burrowing owl.

The HCP does not cover incidental take associated with toxicological effects of herbicides and therefore does not include an analysis of these potential effects.

The specific potential effects of canal lining on burrowing owls are described under Owl - 5.

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Response to Comment G26-19

The comment suggests that the "the Proposed Project will increase habitability for the Desert Pupfish because the Pupfish can tolerate high levels of salinity." The term "habitability" is not used in the EIR/EIS or HCP, and it unclear whether it refers to an increase in habitat quantity, habitat quality, or both. Regardless, implementation of the HCP is intended to improve habitat for pupfish. Measure Pupfish -- 3 in the HCP describes IID's commitment to increase the amount of pupfish habitat in the drains that discharge directly to the Sea; measure Pupfish -- 2 describes the commitment to improve habitat quality (i.e., reduce selenium concentrations) where appropriate. Neither of these measures are linked to the high salinity tolerance of pupfish.

In addition, the comment incorrectly claims that the concentration of pesticides would increase under the Proposed Project in drains inhabited by desert pupfish. As described in the methodology for assessing water quality impacts, TSS is used as a surrogate for constituents that are largely associated with suspended sediments, such as herbicides and pesticides. Table 3.1-17 shows that TSS levels in the drains discharging directly to the Sea are expected to decline under the Proposed Project and pesticide and herbicide concentrations would likewise be expected to decline in these drains (see also Impact BR-26 on page 3.2-129 of the Draft EIR/EIS).

The Proposed Project will have no effect on flows, water quality, or habitat in streams designated as critical habitat for the desert pupfish, such as San Felipe Creek, because these streams are outside of the area where conservation would take place.

critical habitat areas. When the level of Salt Creek is lowered due to the Proposed Project's reduction of inflows, there will no longer be a lagoon where the Creek enters the Sea, and thus a designated critical habitat area for the Desert Pupfish will be eliminated. By definition, the elimination of designated critical habitat is a significant effect, but the Draft EIR/EIS and HCP fail to address either the Proposed Project's impacts on this critical habitat area or mitigation measures for those impacts.

G26-19

Clapper Rail:

The Draft EIR/EIS and HCP fail to adequately identify, evaluate, and provide mitigation for the biological impacts of the proposed project on the Clapper Rail, a non-migratory bird.

G26-20

Inadequacy of the Draft HCP:

Pursuant to Section 10 of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 et seq., take may be authorized through issuance of an incidental take permit for activities carried out in accord with an approved habitat conservation plan ("HCP"). 16 U.S.C. § 1539(a). Before issuing a take permit, the Secretary must make findings including: (1) the taking will be incidental to an otherwise lawful activity; (2) the applicant will, to the maximum extent practicable, minimize and mitigate the impact of such taking; (3) the applicant will insure that adequate funding for the conservation plan will be provided; (4) the taking will not appreciably reduce the likelihood of the survival and recovery in the wild, (5) any an all other measures required by the Secretary have been met; (6) the Secretary has received the necessary assurances that the Plan will be implemented. 16 § U.S.C. 1539(a)(2)(B); 50 C.F.R. 17.22(b)(2). The Secretary must also prepare a biological opinion for any HCP to ensure that issuance of an take permit will not jeopardize listed species or adversely modify critical habitat, and will actually conserve affected listed species. 16 § U.S.C. 1536(a)(1); 1536(a)(2).

The case law interpreting the requirements for take permits and HCPs strongly supports a strict interpretation of the requirements in favor of conservation of covered species.

G26-21

The Draft HCP, along with the Draft EIR/EIS, is inadequate under NEPA and CEQA because it relies on two broad preliminary "approaches" to mitigation for the Proposed Project's impacts to biological resources. Approach 2 is based on fallowing, but as noted elsewhere in these comments the Draft EIR/EIS and HCP fail to adequately assess the feasibility of fallowing or thoroughly evaluate a fallowing alternative. Approach 1, which is given greater consideration, is too vague and general to support the finding on no significant impact to biological resources after mitigation.

Throughout the HCP, the mitigation measures proposed for various types of habitat and particular species are not described with adequate specificity to meet the standard of an informative and legally sufficient EIR/EIS. The overall effect is to mislead the public and the decisionmakers and to subvert the purposes of CEQA and NEPA. In relying on such vague, ill-defined mitigation measures, the Draft EIR/EIS violates CEQA. (*Gentry v. Murrieta*, 36 Cal.App.4th 1359, 1396 (1995))

Response to Comment G26-20

Many Yuma clapper rails that breed at the Salton Sea are migratory, leaving the Imperial Valley during the winter months. The effects of the covered activities and implementation of the HCP were evaluated in detail in section 3.5.6.1 of the HCP.

Response to Comment G26-21

Please refer to the Master Responses on *Biology—Approach to Salton Sea Habitat Conservation Strategy and Biology—Timing of Implementation of Biological Mitigation Measures* in Section 3 of this Final EIR/EIS.

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The Draft HCPs Does Not Minimize or Mitigate Take of Covered Species to the Maximum Extent Practicable

Perhaps the most important requirement of ESA Section 10 is that HCPs must identify steps to both minimize and mitigate take of covered species to the maximum extent practicable. (See 16 U.S.C. § 1539(a)(2)(B)(ii): "the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking.") Both approaches considered in the Draft HCP for the Proposed Project fail to meet this standard.

The Proposed HCP clearly does not fulfill the requirement under the ESA that it mitigate the project's harmful effects on covered species to the maximum extent practicable. In essence, the mitigation proposed for the loss of the entire Salton Sea habitat is the creation of a mere 5,000 acres of fish ponds, the production of tilapia fish in these hatcheries, and pumping these fish into the Sea to provide a temporary food source for some of the water and shore birds that currently depend on the Salton Sea.

G26-22

In particular, the Draft HCP does not objectively and independently evaluate assertions by agency participants or beneficiaries that certain mitigation measures are "impracticable" or "infeasible," and those assertions are not supported by specific reliable documentation of impracticability or infeasibility. *See* U.S. Fish and Wildlife Service Habitat Conservation Planning Handbook at page 7-3. In reality, the alternatives analysis of both the Draft EIR/EIS and HCP are improperly limited by what the IID and SDCWA have deemed economically "practicable" or "feasible." HCP Handbook at page 3-35.

Courts have struck down HCPs and take permits for failing to ensure that their effects had been minimized and mitigated to the maximum extent practical. *National Wildlife Federation v. Babbitt*, 128 F. Supp. 2d 1274 (E.D.Cal. 2000); *Sierra Club v. Babbitt*, 15 F. Supp. 2d 1274 (S.D.Ala.1998).

The Draft HCP Does Not Ensure Survival or Contribute to Recovery of Covered Species

HCPs must not appreciably reduce the likelihood of the survival and recovery of covered species in the wild. 16 U.S.C. §1539(a)(2)(B)(iv). Congress titled Section 10 "conservation plans" consistent with the ESA Section 3 definition of the term "conservation" to include all measures necessary to bring federally listed species to a point at which ESA protections are no longer necessary. 16 U.S.C. §1532(3). "[A]ll measures necessary…" includes consistency with any recovery plans prepared pursuant to Section 4(f) of the ESA. HCPs must therefore at least be consistent with available recovery plans, and move beyond the status quo to actively improve the conservation status of all covered species, especially the rarest and/or narrowest range species.

G26-23

HCP must abide by the following principles to minimize and mitigate take of covered species to the maximum extent practicable, and to ensure the program will not appreciably reduce the likelihood of survival and recovery of covered species.

Response to Comment G26-22

The comment questions whether the HCP adequately demonstrates that the proposed mitigation for the Salton Sea (specifically Approach 1) represents the maximum extent practicable as defined in Section 10 of the federal ESA. The HCP has been revised to eliminate Approach 1 (see the Master Response on *Biology—Approach to Salton Sea Habitat Conservation Strategy* in Section 3 of this Final EIR/EIS). Under the revised approach for the Salton Sea, IID will avoid impacts to the Salton Sea by offsetting the reductions of inflow to the Sea. Because impacts at the Salton Sea would be avoided, the requirement to mitigate to the maximum extent practicable does not apply.

Response to Comment G26-23

The comment offers an interpretation of the ESA that suggests that HCPs must move beyond the status quo to actively improve the conservation status of all covered species. This statement is contrary to the *Endangered Species Habitat Conservation Plan Handbook*, prepared by USFWS and the National Marine Fisheries Service in 1996, which states that no "explicit provision of the ESA or its implementing regulations requires that an HCP must result in a net benefit to affected species." Furthermore, the HCP Handbook indicates that the issuance criterion that states that a section 10 permit must not "appreciably reduce" the likelihood of the survival and recovery of the species in the wild "does not explicitly require an HCP to recover listed species, or contribute to their recovery objectives outlined in a recovery plan." The USFWS encourages HCPs that contribute to recovery plan objectives, but this is not a requirement of HCPs.

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The Draft HCP Does Not Adequately Minimize and Mitigate Take

The Draft HCP emphasizes mitigation and neglects minimization by focusing on the establishment of vague mitigation standards under Approach 1 while effectively precluding the potential for effective avoidance under Approach 2 by ruling out large scale fallowing in the IID-SDCWA Tansfer Agreement.

G26-24

Mitigation is an important component of HCPs, but it must be coupled with earlier, project-level steps to minimize permitted take, including measures such as consideration of less harmful alternative projects and project redesign. As noted elsewhere in these comments, the Draft EIR/EIS and HCP do not adequately consider less harmful fallowing alternatives that would meet the purpose and need for the Proposed Project and should be feasible.

G26-25

The Draft HCP Does Not Include Adequate Measurable Biological Goals and Objectives for All Covered Species

HCPs must contain biological goals and objectives according to the Secretary's Final Addendum to the Handbook for Habitat Conservation Planning and Incidental Take Permitting Process ("Five-point policy"). Federal Register 65 at 35250-35252, June 1, 2000. According to the policy,

> Determination of the biological goals and objectives is integral to the development of the operating conservation program.

Id. at 35251. Biological goals and objectives are central to meeting the take permit applicant's obligation that the HCP minimize and mitigate the harmful effects of take to the maximum extent practicable, and to ensure that permitted activities will not appreciably reduce the likelihood of survival and recovery of covered species.

> [Biological goals and objectives] are the rationale behind the minimization and mitigation strategies. ...the biological goals and objectives of HCPs covering [species with recovery plan goals] should support the recovery goals and conservation.

Id. at 35251. Biological goals and objectives must address each species covered by an HCP.

> ...each covered species must be addressed as if it were listed and named on the permit. Although the goals and objectives may be stated in habitat terms, each covered species that falls under that goal or objective must be accounted for individually as it relates to that habitat.

Id. at 35251.

A clearly articulated set of biological goals and objectives for the overall program and

Response to Comment G26-24

Please refer to the Master Response on *Biology—Approach to the Salton Sea Habitat Conservation Strategy* in Section 3 of this Final EIR/EIS.

Response to Comment G26-25

The HCP includes measurable goals and objectives. For example, the biological goal of the Drain Habitat Conservation Strategy is to maintain the species composition and life history functions (i.e., seasonal occurrence) of covered species using drain habitat within the HCP area. The monitoring program of the HCP (Section 4.0) has been revised (see Attachment A to the present document) and includes surveys to obtain the data necessary to assess whether these goals are achieved. The other habitat conservation strategies are similar.
The Burrowing Owl Conservation Strategy has a very specific biological goal, "The overall biological goal of the Burrowing Owl Conservation Strategy is to maintain a self-sustaining population of burrowing owls across the current range of the owl encompassed by the HCP area." The monitoring and adaptive management program specifically addresses this goal through 1) a demographic study to determine whether the population is "self-sustaining" and 2) monitoring of long-term relative abundance across the Imperial Valley.

For desert pupfish, the biological goal is to maintain viable populations of desert pupfish in the HCP area. This will be accomplished by maintaining or increasing pupfish habitat in IID's drains relative to the current levels (i.e., no net loss) and minimizing the potential that IID's drain maintenance and construction activities and the water conservation program would result in the incidental take of desert pupfish. The monitoring and adaptive management program that was described for pupfish in the HCP for the Draft EIR/EIS has been revised (see Attachment A to the present document).

Razorback suckers in the HCP area are those that have been entrained into the canal system. They are isolated from the main population are not believed to reproduce. The goal of the Razorback Sucker Conservation Strategy is to minimize death or injury of fish entrained in the canal system.

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each covered species are essential to the success of HCPs. Biological goals and objectives are necessary to guide both implementation of the HCP, and to provide a transparent process of HCP planning and implementation to maintain public trust.

Unfortunately, the Draft HCP lacks clearly articulated concrete biological goals for many of the covered species. In particular, the Draft HCP is impermissbly vague with regard to biological goals and objectives for the burrowing owl, the desert pupfish, the razorback sucker, and numerous species of water fowl. Moreover, the vague biological goals included in the Draft HCP do not appear to adequately take into account the rarity, endemism, population viability, and connectivity needs for each covered species.

G26-25

The Draft HCP also is deficient in that it relies too heavily on general habitat protection for the conservation of covered species. Although some special population- and habitat-specific biological goals and objectives are considered, the Draft HCP addresses them in so vague and general a manner as to offer no firm basis for evaluated the proposals efficacy.

The Draft HCP's Adaptive Management Program Lacks Essential Implementation Details

The Draft HCP lacks detailed protective management biological objectives or monitoring plans as part of its adaptive management program, despite their importance and in violation of the ESA and implementing regulations.

G26-26

An adaptive management plan must provide many of the essential HCP implementation details, and it should be prepared early, prior to approval of the program and distributed for public review and comment as a part of the total draft HCP package. The benefits of early preparation – sound science, certainty and public trust – by far outweigh the burden of increased HCP preparation costs.

The adaptive management plan contained in the Draft HCP is extremely vague and lacks sufficient detail to ensure that it will be based on sound science or to provide meaningful certainty that the conservation goals for covered species are met.

G26-27

The Draft HCP Would Permit Take of Covered Species Prior to the Fulfillment of Conservation Goals

The purpose of an HCP is to ensure conservation of covered species while allowing otherwise harmful activities to proceed. To ensure that the HCP's conservation goals are met, it is essential that take of covered species under the HCP is commensurate with funding and implementation of conservation commitments – that is take of covered species and habitat should only proceed as conservation commitments are fulfilled.

The Draft HCP for the Proposed Project, however, would allow the proposed water conservation measures and transfers to begin almost immediately upon approval, while not implementing numerous conservation measures for varying periods of time (up to several years)

Response to Comment G26-26

The monitoring and adaptive management program has been revised. The analysis of the impacts of the covered activities and the effect of implementing the HCP measures on covered species has been revised to provide a more in-depth analysis. Refer to Attachment A, Habitat Conservation Plan, of this Final EIR/EIS.

Response to Comment G26-27

Water conservation activities could affect species associated with drain habitat and the Salton Sea. Under the Drain Habitat Conservation Strategy, managed marsh would be created in three phases, which could take up to 15 years to be completed. As explained in Section 3.5 of the Draft EIR/EIS, for the maximum water conservation level of 300 KAFY, 42 acres of managed marsh would be needed to mitigate impacts to species associated with drain habitat. The effects of the maximum water conservation level would not be reached for about 20 years as the water conservation and transfer program ramps up. Under the Drain Habitat Conservation Strategy, at least 63 acres of managed marsh would be created within 5 years of issuance of the permit. Thus, the maximum impact to species associated with drain habitat that would be attributable to water conservation would be fully mitigated prior to its occurrence.

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G26-27

while surveys are conducted and specific plans are formulated. This approach defeats the conservation purposes of the HCP and violates the ESA.

The Draft HCP Fails to Insure that Adequate Implementation Funding Will Be Provided

An HCP must include an assured funding source for program implementation. 16 U.S.C. §1539(a)(2)(A)(iii). This requirement is obviously central to the success of the conservation strategy, as courts have recognized. In *National Wildlife Federation*, the Court invalidated a take permit for failing to ensure that promised conservation actions would be funded. 128 F. Supp. 2d 1293-95. Yet the Draft HCP plainly fails to fulfill this requirement. Indeed, in the IID-SDCWA Transfer Agreement the proponents of the Proposed Project have capped their financial commitment for any and all mitigation measures for the project at a level that is far below any reasonable estimate of the cost of implementing the HCP. These built-in caps on the project proponents' financial commitment to cover the costs of the HCP are completely inconsistent with the requirement that adequate funding be ensured. Indeed, the Chairman of the IID has conceded that the real cost of mitigation is likely to be close to $300 million.

G26-28

In addition, the Draft HCP fails to articulate specific funding needs, undermining both the Agencies' and the public's ability to make an informed judgment about the plan's feasibility. It is essential that all funding needs, including the cost of promised land acquisition, adaptive management for the reserve and covered species, scientific and compliance monitoring and all other measures be clearly and specifically identified in HCP documents so that the amount of funding necessary to carry out promised measures may be assured.

As a multiple species HCP, the HCP for the Proposed Project should require a substantial down payment on promised conservation measures at the time of approval of the project. The remainder of funding necessary to implement multiple species HCPs over the life of the permit need not necessarily be in the bank, but a process for how this funding will be assured should be disclosed as part of the draft HCP and its adequacy independently analyzed. Agencies participating in multiple species HCPs should establish a policy at the time of HCP approval to provide yearly budgets necessary to carry out conservation obligations.

The Draft EIR/EIS and HCP fail to offer any such assurances that adequate funding for even the initial phases of the HCP will be available at the time of approval or will be raised in any reliable fashion.

G26-29

The Draft HCP Fails To Adequately Specify any Harmful Effects of Permitted Take

HCPs must specify all harmful impacts which will likely result from permitted take of covered species. 16 U.S.C. § 1539(a)(2)(A)(i). For each species, the HCP must: 1) specifically disclose how each aspect of the HCP will affect species' survival and recovery prospects; 2) describe activities that may result in take of covered species; and (3) quantify the anticipated level of take resulting from all activities authorized under the plans. U.S. Fish and Wildlife

Response to Comment G26-28

The comment accurately states that adequate funding for the mitigation program outlined in the HCP must be demonstrated prior to issuance of an incidental take permit. IID acknowledges that the cost of implementing the mitigation likely will exceed the financial cap established for IID's contribution to the program. As described in the Draft HCP, all mitigation costs exceeding IID's established cap would be borne by others if the transfer is to be implemented. Cost and funding issues will be addressed in the Implementation Agreement as agreed to with USFWS, and adequate funding will be demonstrated to USFWS' satisfaction prior to issuance of the incidental take permit.

Response to Comment G26-29

The evaluations of the effects of the covered activities and the HCP on each of the covered species have been revised to better define the expected level of take, the potential impact of that take, and the expected effects of the HCP measures. Refer to Attachment A, Habitat Conservation Plan, of this Final EIR/EIS.

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Service Habitat Conservation Planning Handbook at pages 3-12 - 3-14, 3-20. This analysis must include an evaluation of the HCP's consistency with any draft and final recovery plans and designated critical habitat for covered species.

This analysis must also evaluate the likely short-term and long-term effectiveness of each of the HCP's proposed measures to minimize and mitigate incidental take of covered species and provide a scientifically justifiable reason why and how these measures will mitigate any significant adverse impacts to species to a level of insignificance. HCP Handbook at page 3-19. The analysis must be supported by complete and accurate baseline data including wildlife and plant field surveys, biology and hydrology scientific studies, population viability analyses, and other information to provide a scientifically justifiable basis for the environmental impact analysis. HCP Handbook at page 3-10.

The Draft HCP for the Proposed Project, however, fails to provide meaningful information on any of these factors. One searches in vain for specific information regarding how the HCP will affect many species' prospects for survival and recovery or quantifying the level of take expected to result from the Proposed Project. Similarly, there is no meaningful attempt to evaluate the actual effectiveness, short- or long-term, of the Draft HCP's proposed mitigation measures. And as noted elsewhere there is scarce baseline data for many of the covered species, such as the burrowing owl.

G26-29

The Proposed Project May Not Qualify For An Incidental Take Permit Because it May Not Be An Otherwise Lawful Activity

Take permits can only be issued for activities that are incidental to an otherwise lawful activity. 16 U.S.C. § 1539(a)(1)(B). Thus, a take permit may not be issued for any activity that is in violation of any other law, including, but not limited to, the National Environmental Policy Act, Clean Water Act, Clean Air Act, and the Migratory Bird Treaty Act. As discussed elsewhere in these comments, at the present time the Proposed Project appears likely to violate a number of laws including California fully protected species provisions, the Clean Water Act, the Salton Sea Reclamation Act, and the Migratory Bird Treaty Act. As proposed, the Project violates numerous laws and as such cannot be approved.

G26-30

Other Substantive Deficiencies of the Draft HCP:

G26-31

The term of the proposed HCP is inadequate. The Draft HCP provides for a term of 75 years, which matches the term of the proposed IID-SDCWA Transfer Agreement. (Draft EIR/EIS, App. C [Draft HCP] at ES-3) In order to genuinely achieve it purported conservation goals, however, the term if the HCP must be determined not by the transfer agreement's duration but by the amount of time necessary to effectively minimize and mitigate the Project's harmful impacts on covered species.

The Draft HCP's Salton Sea Conservation Strategy is fundamentally flawed because it is based on a projected terminal decline of the Sea that is inconsistent with the Congressional mandate for restoration of the Sea. As a result of this erroneous assumption, the HCP's strategy

Response to Comment G26-30

The Proposed Project is consistent and in compliance with the named regulations and acts of legislation mentioned in the comment. The commenter should refer to Section 5.3 in the Draft EIR/EIS for a discussion of how the Proposed Project is in compliance with applicable environmental statutes. Compliance with the specific statutes and regulations that are mentioned in the comment are also discussed below:

- **California's fully protected species provisions:** See response to Comment G17-112.
- **NEPA, Clean Air Act, Clean Water Act:** The Draft and Final EIR/EIS, as well as the public decision-making process conducted by the Lead Agencies, was developed in compliance with NEPA, the Clean Air Act, and the Clean Water Act. With out a specific reference to a part of these laws and regulations, this comment is too general to respond to. The commenter should also refer to the Master Responses on *Biology* and *Air Quality* in Section 3 of this Final EIR/EIS.
- **Salton Sea Reclamation Act:** Refer to Master Response on *Other—Relationship Between the Proposed Project and the Salton Sea Restoration Project* in Section 3 of this Final EIR/EIS.
- **Migratory Bird Treaty Act:** Refer to Section 5.3.1 in the Draft EIR/EIS.

Response to Comment G26-31

The comment addresses perceived inadequacies in the approaches to mitigate Salton Sea impacts, specifically the forage pond concept (Approach 1). This approach has been eliminated from consideration and the impact avoidance concept (Approach 2) has been revised to provide greater clarity and detail (see the Master Response on *Biology—Approach to Salton Sea Habitat Conservation Strategy* in Section 3 of this Final EIR/EIS). The comment also broadly states that many of the other conservation strategies contained in the HCP do not contain sufficient detail regarding how the measures would be implemented. The comment is not specific about which elements of the strategies contain insufficient detail. Nonetheless, IID has worked through the details of each of the conservation strategies with USFWS and CDFG since the release of the Draft HCP. The HCP has been revised to reflect the concerns of USFWS and CDFG, as well as many of the comments received during the public review process. The revised HCP is included as Attachment A to this Final EIR/EIS.